No. 80-1681

Office-Supreme Court, U.S.
FILED
JUL 17 1981
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, et al.

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois Corporation

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE APPELLANTS

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July, 1981

APPEAL DOCKETED APRIL 3, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

Pandick Press Midwest, Inc., Chicago • (312) 454-7600

QUESTION PRESENTED

1. The Village's Drug Paraphernalia Licensing Ordinance defines the licensed goods as "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs". The question presented is whether such phrase is so vague as to render the ordinance unconstitutional.

PARTIES TO THE PROCEEDING BELOW:

Appellant is the Village of Hoffman Estates, Illinois, a Municipal Corporation; Virginia M. Hayter, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; Richard N. Williams, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; John O'Connell, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: William W. Cowin, William A. Palmer, Bruce C. Lind, Ralph H. Lyerla, Thomas W. Taylor and Lee Dodgion.

Appellee is The Flipside, Hoffman Estates, Inc., an Illinois Corporation.

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THE OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is officially reported at 639 F. 2d 373 (1981) and further appears in the Appendix to the Jurisdictional Statement at page 1a.

The opinion of the United States District Court, Northern District of Illinois, is officially reported at 485 F. Supp. 400 (1980), and further appears in the Appendix to the Jurisdictional Statement at page 28a.

GROUNDS ON WHICH JURISDICTION IS INVOKED

On February 20, 1978, the Board of Trustees of the Village of Hoffman Estates, Illinois, a home rule municipality, enacted its Ordinance No. 969-1978.

The initial action was filed in the District Court for the Northern District of Illinois by The Flipside, Hoffman Estates, Inc. against the Village of Hoffman Estates and its officials, pursuant to 28 U. S. C. 1331, 2201, 2202 and 28 U. S. C. 1343 and 42 U. S. C. 1983; it challenged the constitutionality of the ordinance and sought damages and declaratory and injunctive relief against enforcement of the Village of Hoffman Estates Ordinance. Following hearings on the requests for preliminary and permanent injunctions, the District Court concluded that the Village of Hoffman Estates Ordinance 969-1978 was constitutional and it entered final judgment for the defendant Village and officials on April 4, 1980.

An appeal was taken by Plaintiff to the United States Court of Appeals for the Seventh Circuit by filing Notice of Appeal on April 7, 1980. The Appeals Court reversed the District Court in a judgment entered January 12, 1981. A petition for rehearing was filed in the Court of Appeals for the Seventh Circuit. On February 5, 1981, the Court of Appeals denied the petition for rehearing. A notice of appeal to this Court was filed on March 19, 1981, in the Court of Appeals for the Seventh Circuit.

The Jurisdictional Statement was filed with this Court on April 3, 1981 requesting review pursuant to 28 U. S. C. Sec. 1254(2). This Court noted probable jurisdiction on June 1, 1981.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Village of Hoffman Estates Ordinance 969-1978 is set forth in the Appendix to the Jurisdictional Statement at 48a.

STATEMENT OF THE CASE

In February of 1978, the Village of Hoffman Estates passed the subject ordinance in an effort to cope with the drug paraphernalia problem by licensing the sale to adults and banning the sale to minors. Eighteen months later, the Drug Enforcement Administration of the United States Department of Justice published a "Model Act" to deal with the problem which has been passed by many states and local jurisdictions and is the subject of much litigation throughout the country. The "Model Act" creates criminal penalties for possession of drug paraphernalia. The ordinance herein licenses the business selling such items and forbids the sale to minors and does not criminalize the use or possession of such items.

The ordinance provides that persons engaged in the business of retailing any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license in order to do so. An applicant must pay a $150 fee and also provide affidavits establishing that every employee authorized to sell such items has never been convicted of a drug related offense. The ordinance requires a licensee to maintain records containing the name and address of every purchaser, the time and date of purchase, and the signature of the selling licensee or his agent. The register must be kept available for police inspection during business hours for two years following the respective dates of purchase. The ordinance bans the transfer of items so deemed to persons under eighteen years of age. A violation of the ordinance is punishable by a fine of not less than $10 or more than $500.

The Village also issued preliminary guidelines defining the terms of the ordinance which were intended to be read in conjunction with it (JA 68). The guidelines provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette rolling papers with trade names "oriented for use with illegal cannabis or drugs", and all "roach clips" are per se within the purview of the ordinance. Pipes and "paraphernalia" fall within the coverage of the ordinance when they are displayed in "proximity" to "literature encouraging illegal use of cannabis or illegal drugs" or "roach clips" (Juris. St. 33a).

Flipside is an Illinois corporation that owns and operates a business known as Flipside Records in the Village of Hoffman Estates. Since opening in 1976, Flipside Records has sold phonograph records, recording tape, clothing, jewelry, novelty devices, as well as a variety of literature, but does not acknowledge it sells drug related paraphernalia (JA 40).

Flipside initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, § 8, Clause 3 and Article I, § 10 of the United States Constitution pursuant to 42 U. S. C., § 1983 and 28 U. S. C. §§ 2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U. S. C., § 1983 for the actions of the Village and its agents, under color of law, which caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order; and on September 1, 1978 denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. The evidence and stipulated testimony established that no expert reports or statistics had been submitted to either the Committee on Health, Safety and Welfare or the Board of Trustees prior to passage of the ordinance (JA 55). A Hoffman Estates police officer testified to facts indicating in his experience, items of the type sold by Flipside were generally found in police related experiences to be used with illegal drugs (JA 51-52). Neither the Village Attorney, who drafted the ordinance and guidelines, nor the Village President, who cast the tie-breaking vote enacting the ordinance, could specifically state which of the myriad exhibits in evidence at trial were covered by the ordinance, and both admitted they would have to rely on police opinion to inform them which objects were presumed to be "designed or marketed for use with illegal cannabis or drugs" if presented the items (JA 67 & 84). The intended impact of the ordinance was shown instead to be a merchant's "manner of marketing". Under the ordinance and guidelines the proximity of literature deemed to encourage the "illegal use of cannabis or illegal drugs" to items not otherwise covered activates the requirement of a license, the register and other attendant penalties.

The Village Administrative Procedures Act (Juris. St. 24a) had not been implemented as no establishment had applied for a license (JA 68).

The original complaint of Appellee Flipside requested damages and injunctive relief because, among other claims, it was alleged the ordinance was "void for vagueness". The United States District Court upheld the ordinance against all constitutional attacks including "void for vagueness".

The Court found that the ordinance was narrowly drawn and recognized that "paraphernalia" has become a standard vocabulary word in the vernacular of the community (Juris. St. 38a). It found that the terms were sufficiently clear to give a reasonably clear idea of what the law requires (Juris. St. 39a).

On February 15, 1980, the trial court entered a Memorandum Order awarding judgment to the Village (JA 88). After a Petition for Rehearing (JA 89) and Petition to Reconsider (JA 96), a timely notice of appeal was filed (JA 110) and after full briefing and oral argument, the United States Court of Appeals for the Seventh Circuit, on January 12, 1981, reversed the judgment of the District Court.

The Seventh Circuit Court of Appeals limited its opinion to only the "void for vagueness" issue finding the ordinance violative of the Fourteenth Amendment since a retailer "is unable to determine what the law expects of him" (Juris. St. 26a). The court recognized that "in the field of regulatory statutes governing business activities ... greater leeway is allowed" but stated that said standard "does not fit in this case" (Juris. St. 20a).

The Court also found no rational connection between testimony that the items had been found to be used with illegal drugs (fact proved) and that therefore, said items were marketed for use with illegal drugs (fact presumed) (Juris. St. 18a).

The Village's petition for rehearing was denied on February 12, 1981 (Juris. St. 46a). The Village's Jurisdictional Statement was filed in this Honorable Court on April 3, 1981 and docketed as Case No. 80-1681.

SUMMARY OF ARGUMENT

It has not been in controversy that the subject Ordinance must pass the two-pronged vagueness test set out by *Grayned* v. *City of Rockford*, 408 U. S. 104. That test requires that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and must provide explicit standards to those who must enforce the laws. A lesser standard of scrutiny, however, applies to a law that does not proscribe criminal activity or regulate First Amendment conduct. Since

the subject Ordinance only regulates the conduct of retailers, it is therefore recognized that the vagueness test of this licensing Ordinance would apply to a retailer with commercial knowledge of the subject matter as stated in *McGowan* v. *Maryland,* 336 U. S. 420.

The words of the Ordinance, "designed for use" with illegal drugs referring to items regulated have been interpreted to connote an intentional act in drug paraphernalia cases in the U. S. Courts of Appeal and District Courts and such interpretation should be made here as an intent standard ought to be read into the law where possible to save its constitutionality, *Screws* v. *United States,* 325 U. S. 91.

The words of the Ordinance "marketed for use" with illegal drugs eliminate the need to determine item by item which generally innocent items must be regulated. Such items need only be regulated when the retailer determines to retail them in a peculiar arrangement or amongst other apparently innocent items whose only common denominator would be use with controlled substances. Judicial notice of such drug paraphernalia marketing techniques has been taken by the lower Federal Courts and should specifically be taken here. The manner of marketing, the fact proved, creates a *Leary* v. *United States,* 395 U. S. 6, presumption that there is a "rational connection" that such items will be used with illegal drugs as the evidence in this case shows this is "more likely than not" to occur. This proof would require a showing of scienter by the retailer who chooses to market in such a manner.

The second prong of *Grayned* calls for standards of enforcement. Although the Village has an Administrative Procedures Act for such purposes, since no retailer had applied for a license at the time of the complaint, no hearings had been held but guidelines for enforcement had been issued by the Village prior to the effective date of the law. Such guidelines were not unlike those of the Drug Enforcement Agency's Model

Act which was drafted some eighteen months after the Village's Ordinance. Such guidelines of the Model Act, a law that creates criminal penalties for mere possession of drug paraphernalia have been upheld by the Eighth Circuit, Tenth Circuit (rejected by the Sixth Circuit) and numerous Federal Courts. Under the standard of lesser scrutiny, the Village's guidelines in conjunction with the Ordinance and the Administrative Procedures Act availability provide fair standards to retailers in the community.

ARGUMENT

I.

The Hoffman Estates Drug Paraphernalia Ordinance That Licenses Items Which Are "Designed or Marketed for Use with Illegal Cannabis or Drugs" Is a Valid and Constitutional Enactment.

Hoffman Estates is an Illinois home rule community of 38,000. This ordinance was drafted in February, 1978 before any published opinions on drug paraphernalia had been issued. At the broad direction of the Village Board, the Village Attorney wrote it as a licensing ordinance to avoid the stricter scrutiny of a criminal prohibition and to minimize the intrusion of the necessary regulation to cope with a most serious problem (JA 55).

In the history of this litigation, it was recognized by Appellant, Village of Hoffman Estates ("Village") and Appellee, Flipside, Inc. ("Flipside") as well as the United States District Court and Seventh Circuit Court of Appeals that the *Grayned* v. *City of Rockford,* 408 U. S. 104, 92 S. Ct. 2294 (1972) standard applied to the issue of vagueness.

This standard has also been deemed settled by this Court when it cited *Grayned* and predecessor cases in *Smith* v. *Goguen,* 415 U. S. 566, 94 S. Ct. 1242 (1974) and said in regard to the due process doctrine of vagueness:

> "The settled principles of that doctrine require no extensive restatement here. The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement."

The *Grayned* standard upon which the Seventh Circuit issued their opinion and upon which this argument is framed is as stated by this Court at 408 U. S. 104, 108-09, 92 S. Ct. 2294, 2298-99 as follows:

> "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."

A. The Ordinance provides sufficient warning to avoid that which is forbidden.

1. Standard of Review of "sufficient warning".

Significant issues in reviewing the standard of "sufficient warning" are: 1) how stringent a requirement is required, and 2) to whom is the "sufficient warning" directed.

The ordinance herein is a licensing ordinance upon the retailer and civil in nature. It is recognized that the Due Process Clause of the Fourteenth Amendment to the United States Constitution applies to both civil and criminal matters.

This Court, in *A. B. Small Co.* v. *American Sugar Refining Co.*, 267 U. S. 233, 45 S. Ct. 295 (1925) found that whether portions of the Lever Act were civil or criminal, they were subject to the exaction of obedience to a vague or indefinite rule. Further, this Court said in relation to a civil provision of the Immigration Act in *Jordan* v. *DeGeorge*, 341 U. S. 223, 230-31, 71 S. Ct. 703, 707 (1951):

> "This Court has repeatedly stated that criminal statutes which fail to give due notice that an act has been made criminal before it is done are unconstitutional deprivations

> of due process of law. . . . Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine of this case. We do this in view of the grave nature of deportation."

This language would seem to imply that if the regulation was not "grave", the Court would not examine the statute. This implication is remedied by the clear language in *Giaccio* v. *State of Pennsylvania,* 382 U. S. 399, 86 S. Ct. 518 (1966) wherein a civil statute that assessed court costs with a total lack of standards was examined. The Court said at 382 U. S. 399, 402, 86 S. Ct. 518, 520:

> "Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process, and this protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. So here this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague."

That the Due Process Clause applies to civil regulation appears settled, but as stated above, how stringent a requirement is required or what due process is due is an important issue. An answer was supplied in *Barenblatt* v. *United States,* 360 U. S. 109, 137, 79 S. Ct. 1081, 1098 (1959) wherein it was stated:

> "It goes without saying that a law to be valid must be clear enough to make its commands understandable. For obvious reasons, the standard of certainty required in criminal statutes is more exacting than in noncriminal statutes. This is simply because it would be unthinkable to convict a man for violating a law he could not understand. This Court has recognized that the stricter standard is as much required in criminal contempt cases as in all other criminal cases, and has emphasized that the "vice of vagueness" is especially pernicious where legislative power over an area involving speech, press, petition and assembly is involved."

The United States District Court in the instant case found that the Village's ordinance was not overbroad and did not regulate areas protected by the First Amendment and that it was not a criminal ordinance (Juris. St. 42a) and, therefore, the more stringent requirements were not applied. The Seventh Circuit Court of Appeals did not reach the overbreadth issue since it found the ordinance unconstitutional on vagueness grounds.

Further, less stringent requirements have been applied in vagueness cases dealing with economic regulation. E.g. *United States* v. *National Dairy Products Corp.*, 372 U. S. 29, 83 S. Ct. 594 (1963), dealing with the Robinson-Patman Act; and see *Smith* v. *Goguen*, 415 U. S. 566, 94 S. Ct. 1242 (1974), footnote 10. Also supportive to the less stringent test by negative implication are cases calling for a greater degree of precision when a statute defines criminal offenses or impinges on activities protected by the First Amendment, *Hynes* v. *Mayor and Council of Borough of Oradell*, 425 U. S. 610, 620, 96 S. Ct. 1755, 1760 (1976); *Winters* v. *New York*, 333 U. S. 507, 515, 68 S. Ct. 665, 670 (1948).

As to whom the "sufficient warning" is directed, it is settled that, absent an intrusion upon fundamental constitutional liberties, vagueness challenges to statutes must be examined strictly on the basis of the statute's application to the particular facts at hand. *United States* v. *Powell*, 423 U. S. 87, 96 S. Ct. 316 (1975); *United States* v. *Mazurie*, 419 U. S. 544, 95 S. Ct. 710 (1975).

The facts at hand are that a retailer of certain items questions whether an ordinance provides a sufficient warning. The law here does not apply to a manufacturer or a consumer but only a retailer. It is at this point that the language of *McGowan* v. *Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961) must be taken into consideration. The Court said at 366 U. S. 420, 428-429, 81 S. Ct. 1101, 1106:

> "We believe that business people of ordinary intelligence in the position of appellant's employer would be able to know what exceptions are encompassed by the Statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county . . ."

It is argued that the *McGowan* case is controlling, and the law is good law and has not changed since the opinion was written by Chief Justice Warren in 1961.

Therefore, in the Village's case herein, persons in the industry which is to be regulated will know what items are designed for marijuana use and what items are designed for regular tobacco, either through their own expertise or by making reasonable investigations.

Under the *McGowan* theory, and the less stringent examination of a licensing ordinance, the ordinance does provide sufficient notice to the retailer of the mischief intended to be remedied.

It is settled that the law must be clear to the "average man" or to "men of common intelligence", and that the rule should be more properly qualified to require fair warning to those potentially subject to it. For example, if a penal statute is addressed to those in a particular trade or business, the terms used in the statute should be sufficiently defined to enable one in that trade or business to apply it correctly. This Court first recognized this application of the rule in *Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 45 S. Ct. 141 (1925), where the court upheld the constitutionality of a law prohibiting the sale of falsely labeled kosher meats. In the next term, they generalized the rule in *Connally* v. *General Construction Co.*, 269 U. S. 385, 391, 46 S. Ct. 126, 127 (1926) and stated in relation to a minimum wage statute directed at employers:

> ". . . it will be enough for present purposes to say generally that the decisions of the court, upholding statutes as sufficiently certain, rested upon the conclusion that they

employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them . . ."

It seems superfluous to state, but nonetheless necessary, that the Court in applying a "sufficient warning" standard that is less stringent must as well be mindful of the duty to seek an interpretation which supports constitutionality of legislation, *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373, 53 S. Ct. 620 (1933) (Justice Cardozo); see also *Aptheker* v. *Sec. of State*, 278 U. S. 500, 84 S. Ct. 1659 (1964).

2. "Sufficient warning" is provided by words "designed for use" and "marketed for use".

Many statutes are inherently vague, since "in most English words and phrases there lurk uncertainties". *Robinson* v. *United States*, 324 U. S. 282, 286, 65 S. Ct. 666, 668 (1945). In *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, 72 S. Ct. 329, 330, 331 (1952), this Court observed that:

> "Few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."

The Court below recognized the less stringent standard but found the ordinance still failed. They said at Jurisdictional Statement 20a:

> "Despite the fact that 'in the field of regulatory statutes governing business activities where the acts limited are in a narrow category, greater leeway is allowed,' *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 162 (1972), this ordinance fails to satisfy the principles behind the vagueness doctrine."

In the present case, this Court should find that the ordinance meets constitutional muster if a person of common intelligence engaged in the business of selling the type of merchandise regulated by the ordinance could examine the ordinance and not be confused by its requirements. The trial Judge in this case found that Flipside, by its conduct, indicated its understanding of the ordinance by removing 72 items from its shelves that were entered as Exhibits (Juris. St. 39a).

The words "designed for use" are not new words in statutes, e.g. 18 U. S. C. 1706, but those words in the drug paraphernalia usage context have been interpreted by three Circuits of the United States Courts of Appeal in the past year with differing conclusions. The three cases are: *Record Revolution No. 6, Inc.* v. *City of Parma,* 638 F. 2d 916 (6th Cir.—1980), vacated and remanded, 49 U. S. L. W. 3882 (May 26, 1981); *Hejira Corp. d/b/a Budget Records & Tapes, Inc.* v. *J. D. McFarlane,* No. 80-2062, May 5, 1981, ____ F. 2d ____ (10th Cir.—1981); *The Casbah, Inc.* v. *Thone,* 80-2033, June 8, 1981, ____ F. 2d ____ (8th Cir.—1981).

The three cases were based upon what is known as the Drug Enforcement Agency Model Act, a model prepared eighteen months after the Village's passage of its ordinance purportedly to assist states and municipalities in combatting the glamourization of drug use (see: Corwin, *Anti-Drug Paraphernalia Laws: Void for Vagueness?* 61 Boston University Law Review 453 (1981) for discussion of the industry and the DEA Model Act). The *Parma* Court invalidated the term "designed for use" by finding no intent or scienter element is incorporated in the language, 638 F. 2d 916, 930. The *Hejira* Court found that "designed" had a clear meaning indicating the item was predetermined for a particular use, Slip Opinion 80-2062 at p. 11. They specifically upheld the term and distinguished the language from *Parma* in that the Colorado statute was written in the conjunctive and required that the item be "designed and intended" and, therefore, the term "designed" was no longer

vague even as it applied to possessor or seller, Slip Opinion 80-2062 at p. 23. The *Casbah* Court rejected the reasoning of the *Parma* Court finding the term "designed for use" not vague over Casbah's claim that it, not being responsible for the design, cannot be liable under a theory of transferred intent. The Court said: "We cannot agree that the term 'designed' refers to the structure of an object." Slip Opinion 80-2033, p. 14. They found that the comments to the Model Act expressly stated that the items are innocent until coupled with the intentional act of design. In accord with this view are four United States District Court opinions: *New England Accessories Trade Association, Inc.* v. *Browne,* 502 F. Supp. 1245 at 1251 (D. Conn.—1980); *Mid-Atlantic Accessories Trade Association* v. *Maryland,* 500 F. Supp. 834 at 844-45 (D. Md.—1980); *Delaware Accessories Trade Association* v. *Gebelein,* 497 F. Supp. 289 at 291-92 (D. Del.—1980); *Brache* v. *County of Westchester,* 507 F. Supp. 566 at 577 (S. D. NY—1981).

Specifically, Judge Harvey said in the *Maryland* case, " 'Design' connotes an intentional act as well as an objective set of characteristics. When considered in the context of this statute, it is clear that it is the subjective, intentional sense in which 'designed' is used." 500 F. Supp. 834 at 844.

The Court below made no attempt whatsoever to apply such reasoning to the words "designed for use" even though the Maryland case was submitted prior to its opinion. They did not discuss or distinguish the *Screws* requirement that the presence of a specific intent standard saves what otherwise might be a vague statute *and* that such a standard ought to be read into a law where possible to preserve its constitutionality. *Screws* v. *United States,* 325 U. S. 91, 65 S. Ct. 1031 (1945). The Court below found that items "designed for use with drugs" could only apply to the manufacturer (Juris. St. 17a) and makes no further discussion of transferred intent or the type of logic used by the District Courts cited above.

Sellers cannot ostrich-like ignore the consequences of their intent and make illogical denials of what persons of common

intelligence know. The owner of Flipside, Lawrence Rosenbaum, testified he sold rolling papers, pipes, jewelry (JA 42-44) but because of the ordinance, the store may "cease to exist" without that profit (JA 45) implying from his view, that these items at his record store are mere tobacco accessories and the tobacco accessory business must be good. He refused to acknowledge he was selling drug related paraphernalia (JA 46). This is not unlike the analogy made over 40 years ago in the Fourth Circuit:

> "To say that the sale of goods is a normally lawful transaction is beside the point. . . . One who sells a gun to another knowing that he is buying it to commit a murder, would hardly escape conviction as an accessory to the murder by showing that he received full price for the gun; and no difference in principle can be drawn between such a case and any other case of a seller who knows that the purchaser intends to use the goods which he is purchasing in the commission of a felony. In any such case, not only does the act of the seller assist in the commission of the felony, but his will assents to its commission, since he could refuse to give the assistance by refusing to make the sale." *Backun* v. *United States,* 112 F. 2d 635 at 637 (4th Cir.—1940).

It is urged the Court specifically consider the Village's phrase "designed for use" in conjunction with the Courts of Appeal and District Court rulings as the finding here will be significant in relation to the many Model Act state statutes that employ this language.

The second phrase questioned by the Court below was "marketed for use" with illegal drugs. It was recognized by the District Court and stated in Flipside's Motion to Affirm filed with the Court that "the intended impact of the ordinance was shown instead to be a merchant's 'manner of marketing' " (Motion to Affirm, p. 5). The guidelines for enforcement clearly indicate that the manner of marketing would be scrutinized (JA 14). Because the ordinance is a licensing law aimed

at retailers only and not a law creating criminal penalties to possessors, manufacturers or retailers, Flipside's offer of evidence at trial and argument (Motion to Affirm, p. 12, f. n. 2) that identical merchandise sold in different stores will be unscathed in one and condemned in another is irrelevant. The second "Whereas" of the subject ordinance recognizes that the "items" are legal retail items (JA 10). This offer of evidence and argument is made consistently in Model Act cases and has relevancy there since the Model Act makes it a crime to possess such items. Examples of this are: *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d at 931, "Detective Rutt would arrest a retailer operating a 'head shop' if it sold alligator clips or cigarette papers, but not a drug store owner selling the same items."; *Mid-Atlantic Accessories Trade Association* v. *State of Maryland*, 500 F. Supp. at 846-349:

> "Unquestionably, there are items which are drug paraphernalia but which likewise may have innocent uses. But the innocent uses are not so related that the same array of items could reasonably be expected to be found in the same store unless the intention was that they be used as drug paraphernalia. For instance, an alligator clip, scales and a pipe might logically be sold together in one store catering to the drug trade, but would hardly all be sold together in a store catering to customers who might want to use these items innocently. . . . As a part of their case, plaintiffs presented the testimony of one Robert De Grazia, an ex-police chief, who purported, as an expert, to support the proposition that police could not be trained to enforce SB 63 evenhandedly.";

See also, *World Imports* v. *Woodbridge Township*, at 493 F. Supp. 430, 431 (D. NJ—1980); *Brache* v. *County of Westchester*, 507 F. Supp. 579, 580 (S. D. NY—1981) wherein the Court found Deputy Commissioner Fulgenzi's testimony virtually identical to Detective Rutt's in *Parma:*

> "Perhaps most revealing was Commissioner Fulgenzi's position that at some point a store becomes so saturated with 'head shop' items that sale or display of virtually any

> dual-use or multi-use product would constitute a crime. . . . When, however, a book section was added with 100 book titles, including *The Marijuana Grower's Guide* and *The Cocaine Consumer's Handbook*, the store had 'definitely' crossed the line. But, if the store were larger and the scale were moved to a jewelry section, you might be safe."

Admittedly, this testimony is not unlike the testimony in the instant case including the Police Chief's stipulation (JA 33).

The point that makes this testimony irrelevant to the issue is that the ordinance's marketing concept is not aimed at the items per se, but the presumed knowledge that said items will be used with illegal drugs. There *is no* rational basis to believe that a hardware dealer intends the alligator clips he sells are to be used with illegal drugs, but there *is* a rational basis to believe that a retailer who sells alligator clips amongst rolling papers, exotic pipes and the like intends or has knowledge they will be used with illegal drugs. Long before the advertising and marketing industry became what it is today, it was recognized that the peculiar arrangement of a large number of suspected objects may be relevant factors as to their intended use. *Israel* v. *United States*, 63 F. 2d 345, 346 (3rd Cir.—1933).

Judicial notice of marketing techniques in the drug paraphernalia industry has been taken. Those establishments that exercise such techniques are known as "head shops". Citing Fed. R. Evid. 201 Judge Debevoise in *Record Museum* v. *Lawrence Township*, 481 F. Supp. 768, 771 (D. N. J.—1979) said:

> "Further, plaintiff's own evidence establishes that in addition to their many innocent and beneficient uses, syringes, needles, eye droppers, spoons, "bongs" or other pipes, testing kits, roach clips and rolling papers are sometimes the means used for taking drugs and collectively are to many the symbol and mark of the drug culture. It is not without significance that retail establishments which sell these items as a distinct line of trade are commonly known as 'head shops'."

The ordinance herein applies to any and all retailers but those who specifically market items with knowledge that they are most likely to be used with illegal drugs are likely to be the "head shops". This is no different than the fact that retailers who must obtain a license to sell milk will most likely be dairy stores, convenience stores and grocery stores.

Judge Debevoise had a second opportunity to review a drug paraphernalia law (having found the Lawrence Township ordinance vague) and expanded his remarks. He said in *World Imports* v. *Woodridge Township*, 493 F. Supp. 428, 431 (D. N. J.—1980):

> "A number of retail stores commonly called head shops specialize in selling drug paraphernalia. Only the naive or duplicitous would contend that sales of drug paraphernalia by head shops are intended primarily for such innocent purposes as making a lamp from a water pipe, fashioning an article of personal adornment from a coke spoon, or feeding wounded birds with syringes and eyedroppers. The purpose of a head shop is to capitalize upon, to perpetuate and to augment the current interest, particularly among the young, in items which are obviously intended for use with illegal drugs."

The "marketed for use" phrase was based upon the standards of presumption stated in *Leary* v. *United States*, 395 U. S. 6, 36, 89 S. Ct. 1532, 1548 (1969) that there is a "rational connection" between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is "more likely than not to flow from" the former. This ordinance being a civil regulation rather than a criminal law, the unsuccessful argument such as that made in the criminal case of *County Court of Ulster County* v. *Allen*, 442 U. S. 140, 99 S. Ct. 2213 (1979) that the "more likely than not" standard violated due process of law is not applicable. It is recognized that the *Leary* case involved statutory presumptions and that presumption is not written into the subject ordinance in so many words as in *Leary*,

but the *Leary* language has been cited as the test for constitutionality of criminal law inferences in general. *Barnes* v. *United States*, 412 U. S. 837, 842, 93 S. Ct. 2357, 2361 (1973). It is indeed possible that an item marketed in the manner stated by the ordinance may be used innocently but the Court has never required that a presumption be accurate in every imaginable case, *Leary* v. *United States*, 395 U. S. 6, 53, 89 S. Ct. 1532, 1557.

This case in relation to the term "marketed for use" differs from Model Act cases since it is not the items that are presumed at the outset to be subject to the licensing ("we agree with the District Court that the listed items are not presumed to be drug paraphernalia", *Record Revolution No. 6* v. *City of Parma*, 638 F. 2d 916, 932) but the items when marketed in such manner that a retailer of common intelligence would have knowledge that such items are more likely than not to be used with illegal drugs.

The Court below summarily rejected the offer of the "fact proved", the manner of marketing (Juris. St. 18a), and therefore, did not reach the issue of the "fact presumed", the use of such marketed items with drugs. This rejection ignores the reality of life in the 1980's, the reality of the existence of the drug paraphernalia industry, the reality of the marketing and advertising industry, and the findings of other courts, as above, in relation to this industry and retailers in particular. The District Court found that the guidelines gave clear standards as to the marketing intent making the *Leary* presumption even "stronger" (Juris. St. 40a).

3. The phrases "designed for use" and "marketed for use" connote the requisite scienter required.

Some of the Drug Enforcement Agency Model Act cases have been decided upon the issue of scienter as scienter may save a statute from vagueness by providing fair notice of proscribed conduct and by distinguishing lawful from unlawful

conduct, *(Record Revolution No. 6* v. *City of Parma,* 638 F. 2d at 934), but as recognized in that case, it is not a term or finding that would avoid a vagueness problem in all cases.

Circuit Judge Henley in *The Casbah, Inc.* v. *Thone,* 80-2033 at 9 (8th Cir.—1981) first stated:

> "Two considerations are basic to our decision on the merits. The first is our belief that we are empowered to articulate the meaning of the drug paraphernalia statute in a manner which supports a finding of constitutionality. The second is our conclusion that the element of intent saves the Nebraska statute from unconstitutional vagueness. On each matter, after careful consideration, we reach a different conclusion from that of the Sixth Circuit, the only other Court of Appeals to have considered the Model Act."

and then adopted the "cogent reasoning" of *Delaware Trade Accessories* v. *Gebelein,* 497 F. Supp. 289 (D. Del.—1980), 80-2033 at 17-18:

> "So-called *constructive knowledge* thus has significance *only* in a situation where the defendant is *selling or delivering* items that he intends to be used to produce or consume illicit drugs in the first place. The legitimate merchant who sells innocuous items need make no judgment about the purpose of the Buyer based upon the surrounding circumstances. The dealer, on the other hand, who sells innocuous items with the intent that they be used with drugs is, in effect, put on notice by the illicit nature of his activity that he must be careful to conform his conduct to the law. Even the illicit dealer, however, is not held legally responsible, as plaintiffs would suggest, for guessing what is in the mind of the buyer. The seller is safe as long as he does not acutally know the buyer's purpose and as long as the objective facts that are there for him to observe do not give fair notice that illegal use will ensue."
> (emphasis added)

It is precisely the significance of the situation cited that permits the constructive knowledge.

The Village ordinance deals only with the merchant and places no responsibility upon the merchant to know the buyer's intent as was the concern in the Delaware and Nebraska cases, both of which upheld the Model Act.

As argued above, "design" connotes an intentional act and "marketed for use" clearly requires a scienter element to carry the *Leary* presumption. The terms are disjunctive and each would place the burden of proof upon the Village to prove the scienter or knowledge of the retailer. Constructive knowledge must be read into the ordinance since its terms connote knowledge and intent.

B. The Ordinance provides adequate guidelines to prevent arbitrary and discriminatory enforcement.

The second branch of the *Grayned* standard calls for explicit standards of enforcement. It has long been recognized that the law-making function shall not be delegated to the whim of the policeman on the beat or the predilections of the prosecutor.

This Court was very clear when it stated the need for standards in *Giaccio* v. *State of Pennsylvania,* 382 U. S. 399, 403, 86 S. Ct. 518, 521 (1966):

> "The Act, without imposing a single condition, limitation or contingency on a jury which has acquitted a defendant simply says the jurors 'shall determine, by their verdict, whether [etc.] . . . Certainly one of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce."

The argument is restated that the scrutiny to be given civil commercial behavior guidelines and standards is, to some degree, less than that given to criminal noncommercial behavior. This Court said in *Smith* v. Goguen, 415, U. S. 566, 574, 94 S. Ct. 1242, 1248 (1974):

> "We recognize that in a noncommercial context behavior as a general rule is not mapped out in advance on the basis of statutory language. In such cases, perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement. It is in this regard that the statutory language under scrutiny has its most notable deficiencies." (emphasis added)

The Village's guidelines were given great weight by the District Court leading the Court to find that reading the ordinance and guidelines together results in a conclusion that the operative words of the ordinance were not vague (Juris. St. 39a). Further, there existed in the Village, as with the Federal Government and most states, an Administrative Procedures Act (JA 20-24) for the purpose of setting more specific regulatory standards which was referenced in Section E of the ordinance (JA 11) and discussed in the testimony at JA 68. The District Court found this of importance (Juris. St. 39a). The Seventh Circuit Court of Appeals, however, was not impressed as any rule-making would be "speculative" (Juris. St. 26a). It must be noted that Flipside's initial complaint was filed during the first month of the ordinance's effect (JA 9 & 12) and before any licensee had applied for a license. Nonetheless, until it was necessary to provide standards, preliminary guidelines were promulgated by the Village Attorney (JA 14 and discussion at 79 and 68 to 73). These guidelines were issued eighteen months prior to the Drug Enforcement Agency Model Act and guidelines. The Model Act guidelines (e.g. *Mid-Atlantic Accessories Trade* v. *State of Maryland,* 500 F. Supp. at 838) contain guidelines to assist in identifying a possessor or manufacturer but as to a retailer, they include among others "(9) the manner in which the object is displayed for sale", "(12) the existence and scope of legitimate uses for the object in the community" and "(7) descriptive materials accompanying the object which explain or depict its use". The similarities to the Village's

guidelines are apparent and both promulgations of guidelines are based upon logically relevant factors to give notice to the retailer of the manner of marketing and design with which the ordinance is concerned.

The presence of guidelines, as in the Model Act, caused the New Jersey District Court to comment that the Model Act is significantly different than prior ordinances since it listed "indicia to aid a court or other authority in determining whether an object is drug paraphernalia. Persons of common intelligence should be able to ascertain whether under all the circumstances an object is or is not drug paraphernalia under ordinance". *World Imports, Inc.* v. *Woodbridge Township,* 481 F. Supp. 428 at 432.

A cursory reading of the seemingly myriad number of cases (see Juris. St. 51a-52a) finds the Courts bogged down in sorting out testimony regarding sizes of "cocaine spoons", meerschaum pipes, scales and the like. The Village's ordinance and guidelines avoid the "close case" situation and simply place the test primarily on the retailer's manner of marketing and permit the retailer to make the choice of his livelihood subject only to a license and control of minors in the same way one who chooses to operate a tobacco store must obtain a license and limit sales to minors and one who chooses to operate a tavern must obtain a license and limit sales to minors.

This Court in *United States* v. *Petrillo,* 332 U. S. 1, 7; 67 S. Ct. 1538, 1541 (1947) said:

> "That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. ... The constitution does not require impossible standards.

It is abundantly clear that the Hoffman Estates ordinance, Guidelines and Administrative Procedures Act provide retailers with a rough idea of fairness.

CONCLUSION

The Judgment of the Seventh Circuit Court of Appeals, insofar as it reversed the decision of the United States District Court, should be reversed.

Respectfully submitted,

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July, 1981